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BEST PRACTICES

In the July 1 issue of *Digital Discovery & e-Evidence*™, Ronald J. Hedges suggested that active case management (by judges and attorneys) is the key to controlling cost and delay that can result from discovery of electronically stored information (ESI), making reference to motions to dismiss in lieu of answers and reasons to seek stays of discovery rather than beginning the discovery process. That analysis is supplemented by noting the effect of the new pleading standards expounded by the United States Supreme Court in *Twombly* and *Iqbal*, and the conclusion is reached that even under those cases, parties will likely continue to incur at least some preservation and collection-related costs before any discovery begins.

An Addendum to "Case Management and E-Discovery: Perfect Together?"

BY RONALD J. HEDGES AND MAURA R. GROSSMAN

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that, to state a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court made clear that to state a claim for relief *in any civil action*, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." 129 S. Ct. at 1949. Moreover, "only a complaint that states a plausible claim for relief survives a motion to dismiss." 129 S. Ct. at 1950.

This is not the place to discuss *Iqbal* or *Twombly*, except to note that those decisions (and those of the lower courts interpreting *Twombly* and—as time passes—*Iqbal*) are likely to lead to the filing of more expansive and fact-sensitive complaints in the United States District Courts and more dispositive motion practice pursuant to Rule 12(b).

It is important to consider one important facet of both decisions: management of discovery and the possibility of cost control through that management is not a substitute for a pleading that cannot survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1953; *Twombly*, 550 U.S. at 558-600. That being said, what costs related to ESI should be expected to be incurred even if a Rule 12(b) motion and a stay of discovery are imposed?

Preservation. First, of course, there is the cost of preservation. The common law duty to preserve relevant information (whether ESI or "paper") arises when litigation is reasonably foreseeable. That duty plainly encompasses information "relevant to any party's claim or

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defense,'' (Rule 26(b)(1)); it may also extend to information ''relevant to the subject matter involved in the action.'' Id.

Does that duty further extend to ESI that might be ''not reasonably accessible'' within the meaning of Rule 26(b)(2)(B)? Can the scope of the duty to preserve information be expanded by receipt of a demand letter from an adversary?

This Addendum does not seek to answer these questions but, rather, raises them to note that ESI and other information must be identified, preserved, and sometimes collected once a litigation hold is ''triggered,'' regardless of whether the complaint appears likely to survive a motion to dismiss.

Rule 11 Review; Possibility of Repleading. Second, at least some of this information must be reviewed by counsel in some form or forms, both to satisfy their professional obligations to their clients and to meet their legal obligations under Rule 11(b). This process could result in further costs, as attorneys might be required to review additional information to meet the *Twombly* and *Iqbal* pleading standards.

Moreover, further costs may be imposed when parties with a deficient pleading avail themselves of the right to replead once under Rule 15(a)(1)(A), or are given leave to do so. Thus, some ESI-related costs will be incurred in any event.

Plainly, dispositive motion practice at the onset of a civil action has the possibility of greatly reducing electronic discovery costs. However, certain costs will inevitably result and, should a complaint survive a motion to dismiss, we submit that the cooperative process imposed by Rule 26(f) and active case management should be able to manage those litigation costs.

Preference for State Court? Given the new, heightened pleading standards, will putative plaintiffs elect to go into state, rather than federal, courts if they have an option to do so? Several commentators have suggested that state courts may treat electronic discovery in a ''less onerous'' manner and at a ''slower pace.'' M. R. Pennington & R. J. Campbell, ''The Class Action Fairness Act and the New Federal e-Discovery Rules: To Remove or Not to Remove?'' *The Federal Lawyer 48* (Feb. 2009).

This seems like an improbable ''solution'' to the cost and delay of electronic discovery, since states may have e-discovery rules that are more stringent in certain respects than the amended Fed. R. Civ. P. (see, e.g., the treatment of information that is ''not reasonably accessible'' under the newly-enacted California Electronic Discovery Act).

This discussion of recent Supreme Court developments involving the earliest stages of civil litigation demonstrates that while not a panacea, the heightened standards involving the initial pleadings may pose new opportunities to reduce the cost and delay that can arise from electronic discovery.

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